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Submitted via e-mail at: rulecomments@nycourts.gov

RE: Request for Public Comment on Proposal to Adopt a New Part 60 of the Rules of the Chief Judge and a New Part 160 of the Rules of the Chief Administrative Judge, to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

Dear Ms. Millett,

I am writing on behalf of Empire Justice Center to provide comments regarding establishment of proposed statewide rules for the referral of civil disputes in the trial courts to Alternative Dispute Resolution (ADR).

Empire Justice Center is a New York-based multi-issue, multi-strategy public interest law firm founded in 1973 that is focused on changing the systems within which poor and low-income families live, including those marginalized by their intersectional identities. Our tools include direct client representation and impact litigation, policy advocacy, training and technical assistance. We have offices in Rochester, Albany, Long Island, and Westchester County. We work in many substantive areas of the law that find our clients in state courts, including, but not limited to, domestic violence and other crime victimization, housing, civil rights, health, LGBTQ rights, public assistance benefits, and foreclosure to name a few.

We respectfully submit these comments in the spirit of access to justice for the communities we serve.

1. **§60.1 (Preamble):** We sincerely appreciate the usefulness and the promise of mediation and other forms of alternative dispute resolution. It is good for the courts, of course, because it can lighten already over-burdened dockets and reduce the demand on attorneys. We also agree that, for many parties and proceedings, access to ADR can be a wonderful tool for avoiding acrimonious and expensive litigation, narrowing issues actually in dispute, or facilitating settlement. However, coming at this proposed rule from the basic premise that mediation is more effective and efficient downplays the concern the income inequality, educational inequality, racism, sexism, disability status, limited English proficiency, homo-and transphobia, and many other intersectionalities conspire to create power and privilege dynamics that we know all too well undercut access to justice.[1] Does ADR alleviate the justice gap or widen it, especially in the vast majority of civil cases beyond Family Court where litigants do not enjoy the right to counsel? Is this proposal evidence-based and, if so, what do the studies tell us about the impacts of ADR outcomes on marginalized communities, communities of color, and people of no or limited means—particularly where one party to ADR benefits from power and privilege, and the other has unequal bargaining power. If this tool is going to be expanded well beyond its current reach, what do we know about its impact on our most vulnerable communities? *We recommend that a working group or series of public hearings be established to discuss and study this essential question before mandatory statewide presumptive ADR in all civil settings is established.*

2. **Diversity, Equity, and Inclusion:** The state courts' commitment to expose and respond to concerns around diversity, equity, and inclusion (DEI) are well documented.[2] In particular, the many recommendations outlined in the October 2020

[1] *See generally* Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures*, 88 Fordham L. Rev. 2407 (2020). This recent article discusses some of the challenges of using ADR for diverse communities. Notably, the May 2020 issue of Fordham Law Journal contains over a dozen papers thought-provokingly analyzing the use of ADR and access to justice. These papers were delivered at a 2019bsymposium entitled, *Achieving Access to Justice Through ADR: Fact or Fiction?*. This symposium was hosted by the *Fordham Law Review* and cosponsored by the National Center for Access to Justice and Fordham Law School's Conflict Resolution and ADR Program. All papers can be found at: https://fordhamlawreview.org/symposiumcategory/achieving-access-to-justice-through-adr-fact-or-fiction/

[2] *See for example*: Franklin H. Williams Judicial Commission: https://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml; Report from the Special Advisor on Equal Justice in the New York State Courts (October 2020)(hereinafter "Jeh Johnson Report"):https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf; Permanent Commission on Access to Justice: http://ww2.nycourts.gov/accesstojusticecommission/index.shtml; Richard C. Failla LGBTQ Commission https://ww2.nycourts.gov/ip/LGBTQ/index.shtml; Advisory Committee on Access for People with Disabilities: https://www.nycourts.gov/ip/advisory-committee-ADA/; Office of Language Access and its most recent report: https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf;

Jeh Johnson Report that the court is actively implementing are all intended to address and help mitigate systemic bias around race and other identities. Therefore, as virtually all civil cases would have the potential to be shunted to ADR now, it is critical that these efforts around DEI are not diluted or lost in the scaling up.

We understand that the rosters around the state are already limited at this time for the cases where mediation is in active use. Has demographic diversity in the current roster been examined? Prior to expanding their reach now to all civil cases, are there efforts underway not only to expand the roster but with a goal of making rosters and mediators across the state more diverse and reflective of the communities that will be served? Building on the concerns raised above in #1, when engaging in ADR, are the mediators extensively trained to recognize and mitigate the bias that indeed all of us carry around issues such as race, gender/gender identity & expression, ableism, and more? Beyond meeting the general mediator training thresholds outlined in Part 146 to qualify, will there be annual training requirements around DEI? *We recommend that either proposed Part 160 or current Part 146 be amended to explicitly require both baseline and annual training in DEI. We also recommend that the proposed rules require that local administrators make efforts, not only to grow, but to diversify the roster of mediators and neutrals and that they report annually on the success of these efforts to recruit and retain around diversity. What other recommendations in the Jeh Johnson Report can help inform the recognition and elimination of systemic bias in ADR?*

Additionally, when entertaining cases, courts and court staff are bound by state and federal laws and policies, court rules, and ethical codes. These requirements address critical issues such as accommodations for people with disabilities, language access, anti-discrimination protections and other safeguards that ensure due process, promote trust and accountability, and help level the field. Failing, for example, to provide for free interpreters, use correct pronouns, or make accommodations, can harm litigants and undermine the success of ADR. Private third-party mediators may not have the same obligations to these clients as a court does. When a case is referred by the court to ADR, those vital protections for litigants should follow—especially around the provision of language access and disability-related accommodations. Providing ADR professionals with broad immunity from liability (*§*160.3) and only a complaint process (§160.2(b)(2)(iv)) to address accountability around bias or discrimination, may not provide sufficient incentive for ADR professionals to meet the diverse needs of litigants. *We recommend that. beyond the standard code of conduct generally referenced in §160.3(d), language be specifically added to the rules that requires ADR professionals to provide for the diverse needs of litigants and the court's role in insuring that these professionals have the resources they need to adequately meet these diversity concerns. For example, this should include translated materials, as well as information around rights to interpreters and for accommodation requests.*

3. **Domestic Violence:** We know, and are grateful, that OCA recognizes and takes very seriously the concerns around using ADR when domestic violence is present. Empire Justice Center was pleased to participate in the DV Committee Working Group that OCA's Statewide Office for ADR convened throughout last year. This DV Working Group

developed screening protocols, curricula, trainings, and resource guides collaboratively with the input of domestic violence attorneys, court personnel, mediators, and others. Significant time and resources have been dedicated to this issue and continue to be expended as the roll out of these tools continues. Therefore, we were surprised that the proposed rules make no specific reference to or mention of domestic violence. We appreciate that the proposal contains language around "allegations of violence or harm, or risk of harm to any person" in §160.2(a)(3)(iv), we believe the language could be more explicit. While the rules cannot address every scenario where ADR may not be appropriate where a history or risk of violence or harm is involved, given the near universal agreement that cases involving domestic violence are exceptions (at this time), the rules should be explicit on this point. *We recommend that the rules explicitly state that domestic violence is an exception and reference the products and policies developed by the DV Working Group. We also ask that the products developed by the working group be made publicly available as soon as possible.*

Further, the DV Working Group developed extensive training resources around identifying and addressing domestic violence and to a lesser extent child abuse and neglect. *We recommend the rules addressing qualifications and training requirements for all mediators should be amended to explicitly include trauma-informed training on family violence, including domestic violence and child abuse and neglect.*

4. **Child Abuse and Neglect:** Section 160.3 addresses the broad confidentiality protections of the ADR process, as well as exceptions. We specifically have concerns around §160.3(b)(5) which provides that if a mediator has "reasonable cause to suspect that a child is an 'abused child' or a 'neglected child' as defined by….the Family Court Act…the appropriate authorities may be notified." While the proposal falls just short of making ADR professionals "mandated reporters" as defined by Social Services Law §413[3], its explicit inclusion in the rules makes clear that reporting to "authorities" such as the Statewide Central Register or law enforcement is almost imperative. While we recognize the vital importance of protecting children from harm or abuse, this well-meaning provision has the potential to problematically inflict the weight of a child welfare system plagued by systemic racism[4] and significant bias on families. This is especially concerning where in most civil proceedings, except certain family or matrimonial law matters, people do not enjoy the right to counsel. Although ADR introduction processes should advise litigants about the confidentiality exceptions prior

[3] Since 1983 when the Attorney General Formal Opinion was published, Social Services Law §413 has been amended over two dozen times adding more and more professions to the list of mandatory reporters. Notably, during that time Community Dispute Resolution Center staff or other mediators and ADR professionals have not been legislatively included in the list of mandatory reporters.

[4] See press release from 4/2/22 from NYSBA's House of Delegates:https://nysba.org/new-york-state-bar-association-finds-child-welfare-system-replete-with-systemic-racism-pushes-for-reforms/?fbclid=IwAR1UgMVaf9KvVet-CfrGYk-LeUeA7MjuO0gooiCfvtm and the recently approved April 2022 report from the Committee on Children and Families in the Law entitled, *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare*: https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-report-and-all-comments.pdf

to referral or screening, some litigants may not understand, anticipate, or appreciate the significant and long-term consequences of sharing information that a mediator may consider child abuse or neglect.

Further, other than *1983 N.Y. Op. Atty. Gen. 44 (N.Y.A.G.),* an Attorney General Opinion from nearly four decades ago, we have found no other legal authority that actually addresses confidentiality and the issue of child abuse reporting in ADR settings. Also alarmingly, these rules are silent on mandatory training and education around child abuse and neglect identification and reporting. *We recommend that the issue of disclosure around child abuse and neglect be subject to further legal examination, public input, and study. Additionally, if ultimately deemed appropriate for the rules, we recommend an explicit training requirement for mediators.*

5. **Reliance Upon Local Rules:** Given the significant differences in judicial districts statewide, we agree that courts around the state should have some ability to customize local ADR practice to fit their needs as addressed in §160.2(a)(1)(i), (iii). However, we fear that with such decentralization there could be significant inconsistency in practice and process across the state. Not only will this be confusing for attorneys that practice in multiple counties, but it will also be confusing for litigants. It may also be difficult to find necessary information about ADR processes if people must look in multiple places, such as both statewide rules and local rules. Many unrepresented litigants simply will not be legally sophisticated enough to know to look in multiple places to educate themselves about their rights. This will place unrepresented parties at a particular disadvantage. *We recommend that, to the extent possible, statewide rules be enacted and local courts be given templates and other tools to streamline and standardize the ADR process as possible.*

6. **Significant Burden Placed on Unrepresented Litigants Who May Want to Opt-Out:** Section 160.2(a)(1)(iii) requires an unrepresented party to be their own advocate by "object[ing] to and opt[ing] out from such referral in accordance with local rule of court or administrative order of the chief administrator of the courts or the chief administrator's designee." With ADR being presumptive, we have concerns that some litigants may be intimidated or coerced into participating in ADR because they believe failing to participate may annoy, upset, or disappoint the court. They may perceive it as mandatory regardless of information shared about ADR processes. Further, the proposed rule §160.2(a)(1) ambiguously states that "*At the earliest practicable time*, a court shall inform the parties to such dispute regarding the available ADR processes. *To the extent possible* the court shall provide the parties…with access to written or electronic materials explaining how ADR is used to resolve a dispute, and the associated costs, if any." [emphasis added]

We agree that it is imperative to timely educate litigants about these processes but recommend that clear statewide standards and goals should be given to local courts on when and how information should be shared, including directives on around language

access and accommodations. These should explain the right to refuse in clear and easily understandable language and provide reassurance to parties that they will not be penalized for failure to participate. We recommend that these be drafted by the Statewide ADR Office to ensure that all parties are provided consistent and accurate explanatory information.

Thank you for the opportunity to share our comments.

Sincerely,

Amy Schwartz-Wallace, Esq.
Senior Attorney and Unit Director